In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 76-25

WILLIAM E. DOULIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Seymour Greenblatt, Esq.
369 Fullerton Avenue
Newburgh, New York 12550
(914) 562-0500

Herald Price Fahringer, Esq.
One Niagara Square
Buffalo, New York 14202
(716) 849-1333

Attorneys for Petitioner

Daily Record Corporation
Rochester, New York

(2075)

Spaulding Law Printing
Syracuse, New York

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Petitioner, WILLIAM E. DOULIN, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on May 14, 1976.

Opinion Below

The opinion of the Court of Appeals, dated June 21, 1976, is unreported, but is printed in Appendix A, *infra*, at p. A-1, *et seq.*

Jurisdiction

Following a jury trial, petitioner was found guilty in the United States District Court for the Southern District of New York of perjury in violation of §1623 of Title 18 of the United States Code. On January 23, 1976 petitioner was sentenced to two and one-half years, six months to be served in confinement.

On May 14, 1976, the Court of Appeals for the Second Circuit affirmed petitioner's conviction.

This petition for a writ of certiorari is filed within sixty days following that affirmance, an extension of time having been granted by Mr. Justice Marshall in an Order dated June 4, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional Provisions Involved

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be

confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statutes Involved

18 U.S.C. §1623

§1623. False declarations before grand jury or court

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any

court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

Questions Presented

1. Whether petitioner's allegedly perjurious answers were material as a matter of law since they did not relate to any cognizable federal offense.

2. Whether petitioner's sixth amendment right to a trial by jury was violated by the trial court's determination that the allegedly perjurious answers were material as a matter of law.

Statement of Facts

The petitioner, William E. Doulin, a funeral director and Chairman of the Orange County Republican Committee, was charged in an eight-count indictment with the crime of making false declarations before a grand jury. The alleged crime centered around the disposition of a criminal case in the Orange County Court involving one Richard Monell. On March 5, 1971, after having plead guilty to attempted assault in the

second degree, Richard Monell received a two and one-half year prison sentence from Judge Abraham Isseks of the Orange County Court. Because the sentence imposed was illegal and Sing Sing Prison would not receive Monell, he was returned for resentencing. On March 25, 1971 Monell was resentenced by Judge Isseks to a term of probation. The Government claimed that Monell's grandmother, Mrs. Grant, paid petitioner $1,500 to "fix" the sentence.

In point of fact, the Assistant District Attorney handling the Monell matter, Abraham J. Weissman, indicated to the Judge at the time of resentencing that his office had received a number of calls from responsible citizens who urged that Monell be treated leniently.

On June 25, 1973 and February 12, 1975, petitioner was called before a federal grand jury allegedly investigating payoffs by gamblers to local police officers in Orange County, mail fraud, and a host of other federal offenses. At these times the grand jury inquired about the disposition of the Monell assault case. The prosecutor asked petitioner whether he was ever paid to intercede in that case, whether he intervened in the case, or whether he discussed exerting influence in the Monell case or any other. The petitioner answered "no" to each question.

In the spring of 1975 petitioner was charged in an eight-count indictment with making a false declaration before a grand jury in violation of §1623 of Title 18. The first three counts of the indictment charged him with making false declarations before the 1972 grand jury while counts 4 through 8 accused the petitioner of lying before the 1975 grand jury.

At petitioner's trial Judge Angelo Ingrassia, the former District Attorney of Orange County; Jerome S. Cohen, an Assistant District Attorney; and Norman Shapiro, a Legal Aid lawyer who represented Richard Monell, all testified that no one spoke to them about the fixing of Richard Monell's sentence. Monell's grandmother, Mrs. Grant, testified that she never

spoke to said Ingrassia, Jerome Cohen or Norman Shapiro about modifying her grandson's sentence and swore that she never paid any money to any one to get Richard Monell out of jail or to have him placed on probation. After the Government rested, defense counsel moved to dismiss the indictment on the grounds that there was no basis for federal jurisdiction. Counsel argued that any alleged irregularities in the Monell case in no way related to the corruption of federal officials or gambling offenses as defined by §1511 of Title 18. The court went so far as to inquire of the prosecution whether the matter should not have been turned over to the state prosecutor in the first place. Despite this acknowledgment that there was no evidence showing a gambling operation the court eventually concluded that the investigation was appropriate because of the references to tax violations in the indictment. A number of prominent people vouched for the petitioner's good character and excellent reputation for truth and honesty including a Judge of the New York Court of Claims, a former Governor and Lieutenant Governor of New York State, a priest, and the former Mayor of Newburgh, New York.

The petitioner was convicted on November 15, 1975 of four counts of perjury and was sentenced to two and one-half years, six months to be served in confinement. The United States Court of Appeals for the Second Circuit affirmed his conviction on May 14, 1976.

Reasons For Granting The Writ

I.

Petitioner's alle_edly perjurious answers were not material as a matter of law since they did not relate to any cognizable federal offense.

Petitioner's conviction involves a highly significant, but dubious jurisdictional ruling that is bound to carry implications and give direction far beyond the facts of this case. The Grand Jury investigat on, as it relates to this case, was unauthorized and consequently petitioner's conviction raises the gravest constitutional doubts.

More importantly, the Second Circuit's judgment gravely undermines the sensitive relationship that must be maintained between federal and state authorities and thus calls for immediate corrective action. In a word, this petition has become the unlikely flashpoint for a most serious threat carefully constructed balance between federal-state relationships.

Preliminary to our discussion of this major issue, attention should be focused on the irrefutable fact that both federal grand juries before which the petitioner appeared were without jurisdiction to investigate the matters about which he testified. Thus, his appearance before both of these Grand Juries was not required and he should not have been indicted for or convicted of perjury. The grand jury's sole inquiry involved the disposition of a state criminal case in Orange County. That is all, and nothing more. No evidence was ever presented to the trial jurors (or for that matter the grand jury) of any undue influence involving any federal offense, illegal interstate acts or federal officials.

In an unbroken series of cases extending over a long stretch of our judicial history, it has been held postulate that before testimony can be considered material it must relate to a valid

subject of a federal grand jury's investigation. In other words, if the grand jury has no jurisdiction to look into the matter it is investigating, all questions are necessarily immaterial. *United States* v. *Mancuso*, 485 F.2d 275 (2d Cir. 1973); *United States* v. *Freedman*, 445 F.2d 1220 (2d Cir. 1971); *United States* v. *Stone*, 429 F.2d 138 (2d Cir. 1970); *Brown* v. *United States*, 245 F.2d 549 (8th Cir. 1957). Obviously petitioner's testimony did not in any way influence or impede an investigation which the grand jury was without authority to conduct.

Recently this Court has brought a halt to the alarming trend of overextending federal jurisdiction. *United States* v. *Maze*, 414 U.S. 395 (1974); *United States* v. *Bass*, 404 U.S. 336 (1971); *Rewis* v. *United States*, 401 U.S. 808 (1971). This case, more than any other, confirms our worst suspicions of how federal jurisdiction can be grossly over-extended and the powers of the federal grand juries grievously abused.*

This unseemly misuse of official power is responsible for a sad catalogue of cases developed throughout this country which have become a disappointing testament to our judicial system's failure to limit the overreaching of federal grand juries which have become masters rather than servants of the law. What was done to the petitioner here offers an ominous omen of what will

*Even the trial judge in this case expressed his misgivings about any federal jurisdiction when he stated to the U. S. Attorney:

> "Should not this matter have been turned over to a state prosecutor to prosecute in the state courts where the judicial system had been undercut and subverted?" (A-1023).**
>
> * * *
>
> "I don't remember anything about a dispute over a gambing operation, proceeds or anything like that. His activities were, in the first instance, removed from gambling" (A-1024).

**Refers to pages of Appendix filed in the United States Court of Appeals for the Second Circuit.

come if some legal limits are not placed on these prosecution tactics. William Doulin should have never been called before the federal grand jury for there was absolutely no authority for the compulsion of his testimony before that body. If this Court gives in to the Government here there will be no end to the unauthorized extension of federal jurisdiction and the misuse of the grand jury process. For all these reasons the petition for certiorari should be granted.

II.

Petitioner's sixth amendment right to a trial by jury was violated by the trial court's determination that the allegedly perjurious answers were material as a matter of law.

There is presented by this petition another question which reaches constitutional proportions. Simply stated, where the element of materiality is an essential element of the crime of perjury, requiring factual proof, may that issue be taken from the jury and resolved by the trial judge alone. Over counsel's objections, the court instructed the jury that "the matters about which Mr. Doulin testified as set forth in the indictment were material to the issues under inquiry by each grand jury before whom testimony was given" (A-1347).

The right to a jury trial in a criminal case, guaranteed by the sixth amendment, includes receiving a jury's judgment on every essential element of the crime charged. In the last decade this Court has reemphasized the importance of a defendant's right to a jury trial. *Baldwin* v. *New York*, 399 U.S. 66 (1971); *Duncan* v. *Louisiana*, 391 U.S. 145 (1968)*; *Bloom* v. *Illinois*, 391 U.S. 194 (1968).

*In *Duncan*, it was observed by this Court that:

> "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge. If the

Footnote continued on next page

We are unable to understand how the factual determination of materiality is any different from the complex questions juries are authorized to decide in cases involving mail fraud, anti-trust prosecutions, SEC violations, conspiracy offenses, or the serious factual decisions made by them in obscenity prosecution involving prurient appeal, contemporary community standards, and redeeming social value.

The concept of materiality being resolved by a judge has its origin in *Sinclair* v. *United States*, 279 U.S. 263 (1920). In *Sinclair* the issue involved whether questions asked of a witness before a congressional committee were "pertinent" to the subject of the inquiry. However, Sinclair was convicted of contempt, and not of perjury, thus making the circumstances distinct from those presented here.

We recognize the ambitious nature in petitioning for certiorari on this issue in view of the *Sinclair* case.* But *Sinclair* was decided almost 50 years ago and deserves re-examination. In a rapidly changing culture, every judgment in the law, particularly those of long standing, exists on the edge of error and must be constantly reviewed. Democratic institutions must maintain their ability to change and make more meaningful

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Footnote continued from preceding page

defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power — a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence" (391 U.S. at 156).

*The Second Circuit never really addressed itself to the question of materiality as a matter of law except to say that the procedure was "entirely proper," citing *Sinclair*.

constitutional imperatives. A Supreme Court that has abolished the systematic exclusion of minority groups from grand juries, bench trials, alibi disclosure statutes, and has struck down a host of other rules, previously tolerated, because they became incompatible with fundamental constitutional principles, can well afford to re-examine this archaic rule which is out of joint with contemporary thought.

The perpetuation of court-determined materiality can no longer be reconciled with a modern-day defendant's right to have his guilt or innocence adjudicated by 12 members of his community. The relentless invoking of this outmoded precedent does little to assure the public that the judicial branch of our Government is adjusting to changing times. For these reasons, this Court should grant petitioner's writ of certiorari.

CONCLUSION

For all these reasons, the writ of certiorari should be granted.

July, 1976

Respectfully submitted,

Seymour Greenblatt, Esq.
369 Fullerton Avenue
Newburgh, New York 12550
(914) 562-0500

Herald Price Fahringer, Esq.
One Niagara Square
Buffalo, New York 14202
(716) 849-1333

Attorneys for Petitioner

APPENDIX

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1036-7—September Term, 1975.

Dkt. Nos. 76-1070, 76-1102

(Argued May 14, 1976
Decided May 14, 1976
Opinion June 21, 1976.)

UNITED STATES OF AMERICA,
Appellee,

—v—

WILLIAM E. DOULIN,
Defendant-Appellant.

Before:

LUMBARD and TIMBERS, *Circuit Judges,*
and JON O. NEWMAN, *District Judge.**

Appellant challenges his conviction in the Southern District on four counts of an eight-count indictment charging him with perjury before two federal grand juries, 18 U.S.C. §1623, principally on the ground that his false testimony was not material to the grand juries' proper inquiry.

Affirmed.

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*Sitting by designation.

Appendix A — Opinion of the United States Court of Appeals for the Second Circuit

BART M. SCHWARTZ, Assistant United States Attorney, New York, New York (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, and Robert J. Jossen and Lawrence B. Pedowitz, Assistant United States Attorneys, New York, New York, on the brief), *for Appellee.*

HERALD PRICE FAHRINGER, ESQ., Buffalo, New York (Seymour Greenblatt, Newburgh, New York; Lipsitz, Green, Fahringer, Roll, Schuller & James, Buffalo, New York, on the brief), *for Appellant.*

LUMBARD, *Circuit Judge:*

William Doulin appeals from his conviction on four counts of an eight count indictment charging him with perjury before two federal grand juries, 18 U.S.C. §1623. Judgment was entered in the Southern District on January 23, 1976 following a one and one-half week jury trial and, on that same date, appellant was sentenced by Judge Ward to concurrent terms of two and one-half years imprisonment, the first six months to be spent in confinement and the remainder to be spent on probation.

Doulin has not, on this appeal, denied the falsity of his statements. Rather, he has argued that his perjurious testimony was immaterial to the proper inquiry of the grand juries and that, in any event, the questions which formed the predicate for the various counts of his indictment were multiplicitous. In addition, Doulin contends that he was prejudiced by the erroneous admission of hearsay evidence. Having heard oral argument and read the briefs, we affirmed appellant's conviction in open court on May 14, 1976. This opinion is in elaboration of that decision.

Appendix A — Opinion of the United States Court of Appeals for the Second Circuit

On August 22, 1972, a grand jury was empaneled and sworn in the Southern District to conduct an investigation into various alleged violations of federal law resulting from the purported attempt by local officials in Orange and adjacent counties to interfere with the enforcement of local gambling laws.[1] During the course of its inquiry, William Doulin, chairman of the Republican Committee of Orange County, was named as someone who, in exchange for illicit payoffs, had provided protection to illegal gambling operations in Orange County. The grand jury heard testimony that Doulin received hundreds of dollars per week from professional gamblers who also paid for his annual vacation in Florida. Doulin was furthermore identified as having interceded on behalf of one Richard Monell in connection with the latter's prosecution and sentence for assault in the New York State courts.

The thrust of the evidence before the grand jury suggested that appellant had been given approximately $1,500 by Mrs. Grant, Monell's grandmother and a lifelong friend of Doulin, to do what he could to insure that Monell would receive only a probationary sentence. As shown at trial, appellant then contacted Abraham Weissman, an assistant district attorney with higher aspirations, and indicated to him that his career would be advanced if he cooperated by recommending to the state trial judge that Monell be released without a jail sentence. Weissman agreed and the desired sentence was imposed.[2]

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[1] 18 U.S.C. § 1511 makes it a federal crime for two or more persons to conspire illegally to influence or obstruct the enforcement of local gambling laws.

[2] The deal between Doulin and Weissman actually pertained to Monell's resentencing. His original sentence of 2 1/2 years imprisonment had been vacated due to the trial court's erroneous reliance upon an already outdated section of the New York Penal Code rather than on the then recently revised provision.

In June 1973, Doulin was summoned to appear before the August 22, 1972 grand jury and provide his version of the above events. Essentially, he denied any improper behavior either with respect to enforcement of the gambling laws or with respect to Monell's criminal case. On February 12, 1975, appellant was called before a second grand jury which had been empaneled in January 1975 to continue the investigation into official corruption and also to inquire into the possibility of perjury having been committed before the first grand jury. Here too, Doulin denied any misconduct as he was questioned about both local gambling operations and the Monell prosecution.

Finally, on June 26, 1975, Doulin was charged in an eight count indictment with having made false statements before both federal grand juries in violation of 18 U.S.C. §1623, counts one to three relating to the first grand jury and counts four to eight dealing with his testimony before the second.

At trial, the government relied primarily upon the testimony of Florence Hall, Richard Monell's girl friend, to establish the falsehood of Doulin's testimony before the grand juries. Hall related in considerable detail her conversations with Mrs. Grant during which Mrs. Grant spoke of her efforts to secure the assistance of the appellant. In one such discussion, Mrs. Grant told Hall that Doulin "needed some money" to give someone else in order to secure the sentence of probation for Monell. Hall also admitted that she had served as intermediary, delivering reassuring messages from Mrs. Grant to Monell that aid would be forthcoming from Doulin. Hall furthermore indicated that she had accompanied Mrs. Grant to the latter's bank in Newburgh where Mrs. Grant withdrew $1,400. The two women then drove to Douiin's funeral parlor (he was an undertaker by profession) and Hall waited in the car while Mrs. Grant went inside with the envelope of money. In addition, Hall testified to

one occasion on which she visited Monell in jail while Mrs. Grant and Doulin were meeting outside; on being introduced to Hall afterwards, Doulin remarked that she must be "the girlfriend of the bad boy."

Hall's testimony was corroborated and amplified by Monell and Norman Shapiro, Monell's Legal Aid lawyer, both of whom repeated statements of Mrs. Grant that she had arranged with "Bill" Doulin for her grandson's probation. Shapiro also recounted a statement by Doulin that he had "put in a good word, or done a favor . . . for a grandson of an old dear friend."

The defense case consisted of Mrs. Grant's insistence that she had never contacted, let alone bribed, Doulin in an effort to influence Monell's sentence. Appellant, who took the stand in his own behalf, made similar protestations of innocence, specifically denying that he had known that Abraham Weissman, the assistant district attorney who handled Monell's sentencing, was interested in becoming the Republican candidate for District Attorney of Orange County. The defense moreover called a series of well-known public officials to vouch for Doulin's character and integrity.

In rebuttal, the prosecution introduced a letter from Weissman to Doulin in which Weissman expressed his appreciation for Doulin's efforts to get the incumbent district attorney to leave office, thereby opening the position for Weissman's presumed accession.

On the basis of the foregoing evidence, Doulin was convicted on four of the seven counts submitted to the jury, one count having been dismissed by the district judge prior to trial. Appellant's principal contention on appeal is that the government did not show, as it must under 18 U.S.C. §1623, that any false statements which he made with regard to his unlawful interference in Monell's prosecution were material to the grand

jury's investigation into a possible corrupt connection between local officials and illegal gambling interests. We are unpersuaded by Doulin's argument which misconceives both the nature and the purpose of the materiality requirement in perjury prosecutions.

It is of course true that no grand jury, including those which examined appellant, is granted an unlimited charter. Its powers are ultimately "subject to the supervision of a judge," *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972). On the other hand, a realistic appraisal of the grand jury's task compels recognition of the fact that, at least at the outset, the eventual scope and direction of its inquiry is often only hazily perceived and tentatively defined. *Blair* v. *United States*, 250 U.S. 273, 282 (1919). The grand jury is an investigative not an adjudicative body and, as such, must be permitted within limits to pursue any leads which may be uncovered. See *United States* v. *Stone*, 429 F.2d 138, 140 (2d Cir. 1970).

> It is in keeping with the grand jury's historic function as a shield against arbitrary accusations to call before it persons suspected of criminal activity, so that the investigation can be complete. This is true whether the grand jury embarks upon an inquiry focused upon individuals suspected of wrongdoing, or is directed at persons suspected of no misconduct but who may be able to provide *links in a chain of evidence* relating to criminal conduct of others, or is centered upon broader problems of concern to society. It is entirely appropriate — indeed imperative — to summon individuals who may be able to illuminate the shadowy precincts of corruption and crime. [emphasis added]

United States v. *Mandujano*, 44 U.S.L.W. 4629, 4632 (U.S. May 19, 1976).

The Congressional decision to restrict the coverage of §1623 to "false material declaration[s]" thus reflects an accommodation of two competing values: It is designed to give to the grand jury the latitude necessary to perform its salutary role while at the same time safeguarding the rights of the individual against state encroachment. To effectuate these twin goals, the now well-settled test of materiality, first expressed by this court in *Carroll* v. *United States*, 16 F.2d 951, 953 (2d Cir.), cert. denied, 273 U.S. 763 (1927), is whether the perjurious testimony has "a natural effect or tendency to influence, impede or dissuade the grand jury from pursuing its investigation." A conviction under §1623 may therefore be sustained upon a showing that a truthful answer to the grand jury's question could conceivably have furthered its inquiry by providing "an evidentiary stone in the larger edifice." *United States* v. *Mancuso*, 485 F.2d 275 (2d Cir. 1973).[3]

Judged against this standard, the materiality of Doulin's perjurious testimony is apparent. We agree with the government's observation that, given the position of public trust which Doulin occupied, his successful intervention in the Monell case surely sheds some light on his ability and inclination to interfere in other cases, perhaps more closely related to illegal gambling. Truthful responses would also have aided the grand jury in

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[3] We recognize that in *United States* v. *Freedman*, 445 F.2d 1220, 1227 (2d Cir. 1971) and *United States* v. *Birrell*, 470 F.2d 113, 115 n.1 (2d Cir. 1972), the government was required to prove that further fruitful investigation *would* have occurred had a truthful answer been given in order to carry its burden of establishing materiality. As we noted in *Mancuso*, however, neither of these decisions involved perjury before a grand jury, 455 F.2d at 281 n.17, and the question of whether the *Freedman* rule would be extended to violations of 18 U.S.C. § 1623 remains an open one. We do not believe this is an appropriate case to resolve that issue since the materiality of Doulin's false declarations is plain whether the "could have" or "would have" test is applied.

learning who was involved in the effort to influence sentencing, and identifying such persons may well have furthered the gambling inquiry.

Appellant's claim that neither federal grand jury before which he appeared had authority to indict him for the substantive offenses about which he has now been found guilty of lying is, even if true, beside the point. The grand jury's duty and indeed responsibility to inquire is not coterminous with its power to indict. See *United States* v. *Mancuso*, 485 F.2d at 283; *United States* v. *Cohn*, 452 F.2d 881 (2d Cir. 1971), cert. denied, 405 U.S. 975 (1971). Nor does materiality hinge upon whether this "propensity" evidence would be admissible at trial. See *United States* v. *Calandra*, 414 U.S. 338 (1974); *Costello* v. *United States*, 350 U.S. 359 (1966).

We thus see no reason to disturb the district court's finding, reached after a mid-trial hearing at which Judge Ward heard the testimony of one member of each of the grand juries involved, that Doulin's perjurious declarations concerning the Monell case were material to the investigation into alleged interference by public officials with enforcement of the local gambling laws. Moreover, it was entirely proper for Judge Ward to decide the question of materiality as a matter of law rather than submitting it as a factual issue for the jury's determination. *Sinclair* v. *United States*, 279 U.S. 263, 298-9 (1929); *United States* v. *McFarland*, 371 F.2d 701, 703 n.3 (2d Cir. 1966), cert. denied, 387 U.S. 906 (1967).

Doulin's contention that the questions asked him by the grand juries were repetitious and the indictment fatally multiplicitous is similarly without merit. While we agree in principle with the Ninth Circuit's statement that "[s]ingle punishment for a single lie should suffice," *Gebhard* v. *United States*, 422 F.2d 281, 290 (9th Cir. 1970), it is clear from an

examination of the instant indictment that each query posed to appellant sought information and that proof of each falsehood necessitated the establishment of different facts. See *United States* v. *Tyrone*, 451 F.2d 16 (9th Cir. 1971); *United States* v. *Andrews*, 370 F.Supp. 365 (D.Conn. 1974). For example, the perjury charged in Count Six concerned Doulin's discussions with Mrs. Grant whereas that charged in Count Seven dealt primarily with his conversations with Weissman. In situations such as this where the grand jury is focusing its attention upon a series of related acts occurring over a period of time, it is inevitable that its questions will overlap to a certain degree. But such overlapping alone is not enough to require that the allegedly false responses of the witness be consolidated into a single perjury count where, as here, each of the critical inquiries was directed to a separate facet of the overall transaction being investigated. [4]

Appellant's final point is that the testimony of Florence Hall, Monell and Norman Shapiro regarding the conversations which each of them had with Mrs. Grant was hearsay and should have been excluded. We disagree. Mrs. Grant's out of court statements that arrangements had been and were being made with Doulin for her grandson's probationary sentence were properly before the jury as the statements of a co-conspirator made in the course of the scheme to subvert the orderly processes of justice. *United States* v. *Ruggiero*, 472 F.2d 599, 607 (2d Cir.), cert. denied, 412 U.S. 939 (1973). Such statements are admissible if the trial judge finds independent

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[4]Doulin has also challenged his conviction upon the ground that the Assistant United States Attorney conducting the investigation never advised him of his right to recant his earlier perjurious testimony, 18 U.S.C. § 1623(d). However, in *United States* v. *Camporeale*, 515 F.2d 184, 189 (2d Cir. 1975), we explicitly held that the government had no such duty to warn a grand jury witness.

evidence that the defendant participated in a conspiracy with the declarant. *United States* v. *Geaney*, 417 F.2d 1116 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970). Doulin's admission to Shapiro that he had put in a good word for Monell as a favor to Mrs. Grant, his meeting with Mrs. Grant and comment to Hall that she must be the girlfriend of the "bad boy," his close friendship with Mrs. Grant, and Mrs. Grant's trip to his funeral parlor with $1,400 in cash provided a reasonable basis for Judge Ward to make a finding of conspiracy. See id. at 1120-21. It is of no import that a conspiracy was not charged in the indictment. *United States* v. *Ruggiero*, *supra* at 607.

Affirmed.